

P.M., Appellant

**U.S. POSTAL SERVICE, POST OFFICE,
Egg Harbor Township, NJ, Employer**

Appearances:

Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

Before:

JURISDICTION

On October 17, 2019 appellant, through counsel, filed a timely appeal from a May 8, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the May 8, 2019 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP abused its discretion in denying appellant's request for authorization of left knee arthroplasty.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 26, 2015 appellant, a 47-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained injuries to her right hip and left knee when she twisted her right hip and left knee while in the performance of duty. She stopped work that day and returned to work in a full-time limited-duty capacity on April 6, 2015. OWCP initially accepted the claim for sprains of the right hip, left knee and right shoulder, and subsequently expanded acceptance of the claim to include left knee medial meniscus tear.

On September 6, 2016 OWCP received a request for authorization of a left knee total arthroplasty. By decision dated April 3, 2017, it denied appellant's request for authorization of a left knee arthroplasty. OWCP found that Dr. Zachary D. Post, a Board-certified orthopedic surgeon, appellant's treating physician, had not established the medical necessity for the requested procedure and both OWCP's district medical advisers (DMA) and Dr. Stanley Askin, a Board-certified orthopedic surgeon, OWCP's second opinion physician, had opined that the requested procedure was not medically necessary to treat her accepted employment injury. By decision dated August 21, 2017, an OWCP hearing representative affirmed the denial of authorization of a left knee arthroplasty, finding that Dr. Askin's opinion constituted the weight of the medical evidence.

Appellant appealed to the Board. By decision dated November 7, 2018, the Board affirmed OWCP's August 21, 2017 decision. The Board found that appellant's treating physicians' opinions were incomplete as they did not address appellant's preexisting degenerative condition of the left knee or appellant's history of nonoccupational rheumatoid arthritis. The Board concluded that OWCP did not abuse its discretion in denying authorization for the requested left knee arthroplasty as the evidence established that the procedure was not recommended for a condition causally related to the accepted employment injury and that it was not medically warranted.⁵

In a September 5, 2018 report, Dr. Andrew Farber, an osteopathic physician specializing in orthopedic surgery, acting as an OWCP second opinion physician, reviewed a statement of accepted facts (SOAF), the evidence of record, and noted examination findings. He opined that appellant's left knee condition had not reached maximum medical improvement. Dr. Farber related that appellant's examination findings indicated that her left knee medial meniscus tear remained active and may have worsened. He also noted that appellant had underlying degenerative changes and a history of rheumatoid arthritis. Dr. Farber opined that appellant could return to

⁴ Docket No. 18-0543 (issued November 7, 2018).

⁵ *Id.*

work in a sedentary position with lifting restrictions of 10 pounds. He opined that further treatment was needed and vicosupplementation should be considered.

Dr. Post continued to submit treatment notes diagnosing primary osteoarthritis of left knee.

In a March 2, 2018 report, Dr. Matthew R. Arkebauer, a Board-certified rheumatologist, noted that appellant was being treated for rheumatoid arthritis at various sites.

On February 8, 2019 counsel requested reconsideration regarding the denial of appellant's request for left knee arthroplasty.

In a December 12, 2018 report, Dr. Post diagnosed primary osteoarthritis of left knee. He indicated that appellant failed all conservative measures for treatment of her left knee including medications, injections, physical therapy, and previous arthroscopy. Dr. Post noted positive findings on examination and indicated that the arthroscopy report demonstrated significant degenerative change including cartilage breakdown and meniscal tearing isolated to the medial compartment. He opined that the employment injury of February 26, 2015 was the direct cause of the required total left knee replacement. Dr. Post indicated that the conservative measures failed to improve her ability to return to work or decrease her pain. He also indicated that the series of x-rays taken in 2015, 2016, 2017 and now 2018 demonstrated mild degenerative changes progressively over the years, which are a clear indication of the causal nature of the February 26, 2015 employment injury.

OWCP also received medical reports and magnetic resonance imaging (MRI) scans concerning appellant's right knee condition. Statements from appellant and counsel concerning a suitability finding were also received. In a January 24, 2019 statement, appellant indicated that her right knee was getting worse and that she was waiting for her left knee to be repaired.

By decision dated May 8, 2019, OWCP denied modification of its prior decision. It found that appellant had not established that the accepted employment injury caused or aggravated her preexisting left knee arthritis and did not establish that the requested left knee total arthroplasty procedure was medically necessary for treatment of her accepted left knee conditions.

LEGAL PRECEDENT

Section 8103 of FECA⁶ provides for the furnishing of services, appliances, and supplies prescribed or recommended by a qualified physician which OWCP, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.⁷ In interpreting this section of FECA, the

⁶ *Supra* note 2.

⁷ 5 U.S.C. § 8103(a); *see M.P.*, Docket No. 19-1557 (issued February 24, 2020); *M.B.*, 58 ECAB 588 (2007).

Board has recognized that OWCP has broad discretion in approving services provided under section 8103, and the only limitation on OWCP's authority is that of reasonableness.⁸

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.⁹ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.¹⁰ In order to prove that the procedure is warranted, appellant must establish that the procedure was for a condition causally related to the employment injury and that the procedure was medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.¹¹

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.¹²

ANALYSIS

The Board finds that OWCP did not abuse its discretion in denying appellant's request for authorization of left knee arthroplasty.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's August 21, 2017 decision. The Board considered that evidence in its November 7, 2018 decision and affirmed OWCP's denial of he requested procedure. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹³

Following the Board's prior decision, in a December 12, 2018 report, Dr. Post diagnosed primary osteoarthritis of left knee. He opined that the employment injury of February 26, 2015 directly caused the necessary total left knee replacement. Dr. Post opined that the series of x-rays taken in 2015, 2016, 2017, and 2018 demonstrated mild degenerative changes progressively over the years, which was a clear indication that the February 26, 2015 employment injury caused the current condition. He also indicated that conservative measure had failed. While he identified

⁸ *B.I.*, Docket No. 18-0988 (issued March 13, 2020); *see also Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic, and probable deductions from established facts).

⁹ *J.M.*, Docket No. 20-0565 (issued November 5, 2020); *see R.M.*, Docket No. 19-1319 (issued December 10, 2019); *Debra S. King*, 44 ECAB 209 (1992).

¹⁰ *B.I.*, *supra* note 8; *see also K.W.*, Docket No. 18-1523 (issued May 22, 2019); *Bertha L. Arnold*, 38 ECAB 282 (1986).

¹¹ *P.L.*, Docket No. 20-0392 (issued October 28, 2020); *see T.A.*, Docket No. 19-1030 (issued November 22, 2019); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

¹² *See J.P.*, Docket No. 18-0349 (issued December 30, 2019); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

¹³ *J.R.*, Docket No. 20-0211 (issued November 5 2020); *see B.R.*, Docket No. 17-0294 (issued May 11, 2018).

preexisting degenerative conditions in appellant's left knee that could worsen partially due to the natural aging process, Dr. Post did not distinguish the effects of the aggravation due to age from the aggravation, if any, due to her federal employment. As noted above, in cases involving a preexisting condition, the Board has placed special emphasis on the need for complete medical rationale with a physiological explanation that distinguishes the effects of the natural progression of the preexisting condition, any effects caused by aging or nonwork-related injuries and the employment factors.¹⁴ This report contains no such rationale and is, thus, insufficient to establish causal relationship between appellant's left knee degenerative conditions, her rheumatoid arthritis, and the accepted employment injury. The Board also notes that Dr. Post's December 12, 2018 report did not provide further medical rationale substantiating that the requested procedure was medically necessary. As previously noted, in order to establish that the procedure should be authorized, appellant must establish that the procedure was for a condition causally related to the employment injury and that the procedure was medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.¹⁵ The Board therefore finds that Dr. Post's report was insufficient to establish that the requested left knee total arthroscopy was medically warranted as a result of the accepted February 26, 2015 employment injury.

Appellant also provided medical and diagnostic reports pertaining to her right knee condition. These reports do not offer any medical opinion evidence regarding her left knee condition and, thus, are not relevant to the issue of whether the requested left knee arthroplasty was medically warranted and causally related to her accepted February 26, 2015 employment injury.¹⁶ Appellant's and counsel's statements are of no probative value in establishing medical necessity of a requested procedure.

The only limitation on OWCP's authority in authorizing medical treatment under FECA is one of reasonableness.¹⁷ OWCP obtained a second opinion evaluation, which the Board previously found was well rationalized and supported a finding that the requested surgical procedure was not medically warranted as appellant's underlying left knee preexisting conditions, not the February 26, 2015 work injury, was responsible for the need for the total arthroplasty. The new evidence is insufficient to modify that finding. OWCP therefore did not abuse its discretion.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁴ See *S.H.*, Docket No. 19-0631 (issued September 5, 2019); *D.F.*, Docket No. 19-0067 (issued May 3, 2019).

¹⁵ *Supra* note 11

¹⁶ 5 U.S.C. § 8103. OWCP shall furnish the services which it considers likely to cure, give relief, or reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation. However, the employee has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition. The employee must also establish that the procedure is medically warranted. *T.A.*, Docket No. 19-1030 (issued November 22, 2019); *D.K.*, 59 ECAB 141 (2007); *R.C.*, 58 ECAB 238 (2006).

¹⁷ *Supra* note 8; see *P.F.*, Docket No. 16-0693 (issued October 24, 2016); *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

CONCLUSION

The Board finds that OWCP did not abuse its discretion in denying appellant's request for authorization of left knee total arthroplasty.

ORDER

IT IS HEREBY ORDERED THAT the May 8, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 23, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board